

If you have any questions, please e-mail or telephone me.

Sincerely yours,

*/s/ Ramón Peján*

Ramin Pejan  
Assistant Corporation Counsel  
Environmental Law Division

Cc: James A. Pardo (via e-mail)  
All Counsel (via LNFS)

# **EXHIBIT D**

Law Offices of  
**MILLER, AXLINE & SAWYER**  
A Professional Corporation

DUANE C. MILLER  
MICHAEL AXLINE  
A. CURTIS SAWYER, JR.

TRACEY L. O'REILLY  
TAMARIN E. AUSTIN  
EVAN EICKMEYER  
DANIEL BOONE  
JUSTIN MASSEY

March 30, 2009

VIA U.S. MAIL AND FACSIMILE

Matthew T. Heartney, Esq.  
Arnold & Porter  
44th Floor  
777 South Figueroa Street  
Los Angeles, California 90017

Re: *Orange County Water District v. Unocal Corp., et al.*  
**Bellwether Plumes**

Dear Mr. Heartney:

I am writing in response to your March 20, 2009, letter concerning the Bellwether Plumes designated by plaintiff Orange County Water District's (the District'). Contrary to the assertions in your letter, the District has not revised the Bellwether Plume list, but rather has identified the wells associated with each plume to reflect new water quality data for public drinking water wells, and to comply with several orders from Judge Scheindlin.

The District advised defendants in 2007 that the Bellwether "Plume List will . . . be adjusted to reflect new MTBE and/or TBA water quality data which is being gathered and analyzed by the District on an ongoing basis." (See April 23, 2007, Letter from T. O'Reilly to J. Anderson.) As defendants are aware, sampling by the District in Fall 2008 demonstrated that MTBE was detected for the first time in approximately 55 public drinking water wells. (See January 23, 2009, Letter from T. O'Reilly to J. Anderson.) The revised list of wells associated with Bellwether Plumes served by the District on January 28, 2009, reflected the newly obtained MTBE water quality data for public drinking water wells within the District.

When we discussed this new data with Judge Scheindlin on January 29, 2009, she pointed out that the District would be entitled to file a new case whenever there were new detections of MTBE in a well (R.T. (Jan. 29, 2009) at 10:15-11:4) and that adding these wells with new detections to the District's existing case is, in reality, "merely an administrative issue . . ." (*Ibid.*) (See Ex. A, attached.) She specifically asked the District to identify the plumes with which the

Matthew Heartney  
March 30, 2009  
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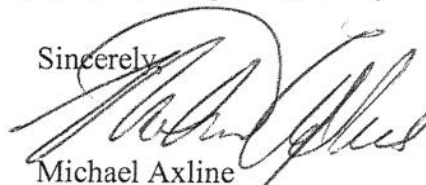
new detections were associated, and included all plumes (not just focus plumes) in her direction to the District. (R.T. (Jan. 29, 2009) at 22:10-12 I "I want to stick with the 87. If in three weeks from today you can provide all of the well identifications, that's helpful.") This is precisely what the District did.

During the January 15, 2009, MDL Status Conference, at defendants' request, Judge Scheindlin ordered the District to amend its Bellwether Plume list to reflect only claims which were ripe. (R.T. (Jan. 15, 2009) at 64:7-65:3.) (See Ex. B, attached.) Additionally, during the January 29, 2009, telephonic conference in this matter, Judge Scheindlin ordered the District to provide a "listing of the wells in the vicinity of the [existing] plume that you say are under imminent threat." (R.T. (Jan. 29, 2009) at 19:20-20:2; 21:12-22:12.) In fact, defendants specifically requested that Judge Scheindlin compel the District to identify all wells which were threatened by the Bellwether Plumes. (R.T. (Jan. 29, 2009) at 12:22-13:3.) The identification of wells affect by the District's Bellwether Plume was not only authorized by the Court, but was undertaken to comply with Court orders sought by defendants.

Your critique of the wells designated for plumes is misplaced. The "examples" you give as anomalies are not anomalies at all, but rather reflect the complexities of hydrogeologic reality. As you know from numerous depositions in this case, the direction of groundwater flow depends on a number of factors, including the depth of groundwater being measured and the influence of well pumping. As just one example, groundwater separated into layers by impermeable lenses can flow in one direction at a given depth and the opposite direction at a different depth. Wells can also be threatened by or contaminated from more than one plume. As we stressed to Judge Scheindlin during the January 29, 2009, call, determining the relationship between a source and a contaminated well ultimately is an iterative process that requires expert analysis. Nevertheless, the District agreed to respond to your request for a list that identifies wells with plumes. To the extent you disagree with the conclusions reflected on that list, that is a matter for experts to address.

Finally, defendants have been aware for some time of the public drinking water wells and their relationship to various plumes. Maps of the District's Bellwether Plumes have routinely included information on all drinking water wells in the vicinity of the designated stations. Moreover, defendants have already conducted discovery regarding several of the revisions made by the District. For example, during his deposition concerning Bellwether Plume No. 1, Roy Herndon identified additional public drinking water wells that are in the proximity of the Bellwether Plume No. 1 stations. (Herndon Depo. (Nov. 4, 2008) at 2230:18-2231:10.) To the extent that defendants question whether the new data provides an adequate basis for identifying the additional wells, such inquiries may be addressed in expert discovery.

Sincerely,



Michael Axline  
Counsel for Orange County Water District

# **EXHIBIT A**

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1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

2

3 IN RE: METHYL TERTIARY BUTYL 00 MDL 1358  
3 ETHER ("MTBE") PRODUCTS Master File C.A.  
4 LIABILITY LITIGATION No. 1:00-1898(SAS)

4

5 -----x

6 This Document relates to:  
6 ORANGE COUNTY WATER DISTRICT v.  
7 UNOCAL CORPORATION, et al,  
7 S.D.N.Y. No. 04 Civ. 4968 (SAS)

8

9 -----x

10 January 29, 2009  
10 11:30 a.m.

11 Before:

11

12 HON. SHIRA A. SCHEINDLIN,

12

13 District Judge

13

14 APPEARANCES

14 MILLER AXLINE & SAWYER

15 Attorneys for Plaintiff Orange County Water District

15 BY: MICHAEL AXLINE

16 DUANE MILLER

16 TRACEY L. O'REILLY

17

17 SHEPPARD MULLIN RICHTER & HAMPTON, LLC

18 Attorneys for Defendants

18 Exxon Mobil (Orange County)

19 BY: JEFFREY J. PARKER

19

20 KING SPALDING, LLP

20 Attorneys for Defendant Chevron U.S.A., Inc.

21 BY: CHARLES CORRELL, Jr.

21

22 McDERMOTT, WILL & EMERY

22 Attorneys for Defendant Exxon Mobil Corp.

23 and defendants' liaison counsel

23 BY: JAMES PARDO

24

24 ARNOLD & PORTER

25 Attorneys for Defendant BP

25 BY: MATTHEW T. HEARTNEY

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1 but in writing from each of these that they've designated to  
2 know specifically why, applying their four-prong test, a given  
3 plume and everything in that plume is in the case, why the  
4 claim has accrued and it's ripe. That should have been, as I  
5 said, known before the lawsuit was filed. You know, to get  
6 these results which they have had in their possession since  
7 October or November --

8 THE COURT: October or November of what year?

9 MR. PARKER: 2008. For the new wells that were just  
10 disclosed to us yesterday, they have had that in their  
11 possession. To then drop this on us the day before this  
12 hearing and suggest that therefore everything is thrown off and  
13 that we don't get an accrual chart or can't get an accrual  
14 chart is just wrong.

15 THE COURT: There's a lot of things going on here now  
16 at once. One is this issue of newly threatened wells, shall we  
17 call them, or newly contaminated wells. You are in a situation  
18 that, without meaning to make a pun, is a fluid situation,  
19 meaning within the Orange County Water District there can  
20 indeed be new contaminations that occur all the time, every  
21 month, every six months, every year. And what Mr. Miller is  
22 saying is we can keep filing suit every time a new one occurs,  
23 or we can add it to the great big Orange County Water District  
24 suit that we have. If we did it separately every time, in  
25 addition to the Court getting a filing fee of \$275 or

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1 something, basically it would be consolidated. Basically, we  
2 would be putting this all together until someday there's a  
3 resolution either by settlement or trial. So that's one issue.

4 To me, that's merely an administrative issue, what do  
5 you do when there's a new hit in the same plaintiffs' property,  
6 so to speak, so it's all Orange County. We're not talking  
7 about a different case, a different county, a different state.  
8 It's all Orange County. There's a new hit. What do we do, add  
9 it to the new case, bring a separate case, consolidate now?  
10 That's a new issue that I think should be put to the side.

11 I think we need to go to the now 80 plumes that have  
12 been in this case since the beginning where I think your point  
13 is well taken. There, these plumes, these 80, have been around  
14 for years, and you're still struggling to get an accrual chart,  
15 so to speak, pin down the date -- wait, wait, I'm still  
16 speaking -- the date on which the claim accrued as to that  
17 particular source, and you either have it or you don't have it.

18 Now, was that Mr. Axline? Did I hear his voice, or  
19 somebody?

20 MR. AXLINE: Yes, your Honor. I'm sorry for  
21 interrupting.

22 THE COURT: Do you think you've produced such a chart?

23 MR. AXLINE: Your Honor, I don't think that such a  
24 chart is capable of being produced in the form that the  
25 defendants are referring to because the factors that go into

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1 making that determination are too complex and require expert  
2 testimony.

3 THE COURT: That's what I said before. I said from  
4 the answer Mr. Miller gave, you would have to sit down with a  
5 hydrogeologist and take 80 plumes one by one by one and say how  
6 did you determine this particular plume is ripe now, and the  
7 hydrogeologist would have to say the geography, the down  
8 gradient, the distance, the rate of flow, all those scientific  
9 words, he'd have to say all of that, say I put all those  
10 factors together and I decided there's a threat either now or  
11 within a year or two. But it would be one by one by one.

12 But he certainly could list out the criteria, like,  
13 for example, the words I just said, and I'm no scientist, but  
14 I've been reading these reports for years. He could certainly  
15 list these are the kinds of factors that I consider for every  
16 plume. Then I analyzed -- let me finish. Hold on.

17 Then I analyzed each of those factors, I measured each  
18 of those factors, the distances, the rate of flow and the  
19 direction, this and that, I measured all these factors for each  
20 of these plumes. Based on the totality of all these factors, I  
21 reached the conclusion.

22 MR. CORRELL: Judge, one problem with the new standard  
23 that was just articulated now about within one to two years a  
24 drinking water well, and I don't have the exact numbers with  
25 me, but I think out of these 80 plumes they've only designated

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1 a well with about 20 of them. So on the remainder of the  
2 plumes if that is truly the criteria, there should have been a  
3 well identified associated with it.

4 THE COURT: I'm glad somebody else is picking up on  
5 this difference between plumes and wells because Mr. Miller  
6 started out about ten minutes ago talking about 50, 60 new  
7 wells, and I didn't understand the connection between that and  
8 the plumes. You're saying with 80 of these plumes, 60 aren't  
9 associated with any wells. Is that what you just said?

10 MR. CORRELL: If you look at their plume list, you'll  
11 see there's a column for well, and most of the focus plumes  
12 have wells associated with them. And then you go down that  
13 list, and very few have a well associated.

14 THE COURT: Let's talk to Mr. Miller who was the one  
15 who provided a definition of what is an imminent threat.

16 Mr. Miller, if 60 of these plumes have no well  
17 associated with it, then how does the expert say, Oh, within a  
18 year or two, the well is under threat of being contaminated?  
19 There is no well.

20 MR. MILLER: Your Honor, we recently received the  
21 reports from the lab and the experts are going through the  
22 process of comparing those to plumes to determine where the  
23 impact of the well came from, and because these detections  
24 occurred so recently, they have not completed that process yet.

25 THE COURT: I don't know --

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1 commingle with another plume? Why do you say ARCO is the same  
2 plume? Don't know, we're still doing our investigation.

3 But going back to the chart, you would think at a  
4 minimum on their plume list they would have to identify the  
5 well that they claim is threatened in the next one or two years  
6 because you've got, estimating 60 plus of these plumes, under  
7 the well column, no well identified.

8 THE COURT: That is very troubling. I agree with  
9 that. I'm trying desperately to pin down Mr. Miller about  
10 that. If a plume is not linked to a well, I don't understand  
11 the imminency of the threat. It should be off the list, not on  
12 the list.

13 MR. MILLER: Your Honor, in prior discussions, listing  
14 the well has never been part of the accrual chart. It's been a  
15 part of the chart for the focus cases. And if that would  
16 assist matters within a reasonable amount of time, we can come  
17 up with a list that explains this part of it. It will be  
18 complex testimony by hydrogeologists about how they made those  
19 determinations.

20 THE COURT: First there should be a listing of the  
21 wells in the vicinity of the plume that you say are under  
22 imminent threat. That can be just done as a chart. Just as  
23 with some plumes you do list a well or wells, I don't  
24 understand why you can't do that for the remaining 60. If  
25 there's a good faith basis for them to be on the list of ripe

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1 claims as you've defined it, then you have to link it to a  
2 threat to a well. Why can't you identify --

3 MR. MILLER: We did, but there's been no prior  
4 suggestion to the defendants that the key to the accrual chart  
5 is identifying the well. That's not what they've asked us to  
6 do in the past, and we can try that approach and take some  
7 time, but it can be done.

8 MR. CORRELL: In the past, I think it's been the  
9 position of the district that their claims weren't based on  
10 wells.

11 THE COURT: But today, it seems it is. Today the  
12 definition I heard and, thankfully, I have a reporter. Today,  
13 Mr. Miller's definition is that within a reasonable period of  
14 time, somewhere in the vicinity of one to two years, the well  
15 will be threatened.

16 MR. AXLINE: This is Mike Axline again.

17 As you know, the process of developing accrual in the  
18 case is a definitive process, and that's particularly true with  
19 complex contamination issues such as this, as you have  
20 previously recognized. Your reference to a good faith belief  
21 that stations are linked to particular wells is, I think,  
22 helpful, because the district is sort of in a jam. If it jumps  
23 the gun and identifies a station with a well before it develops  
24 complex proof, then it gets called to task by the defendants  
25 for not having adequate proof. On the other hand, if the

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1 district doesn't link the station to the well, then the  
2 defendants claim that there's no basis for it.

3 THE COURT: Right.

4 MR. AXLINE: The reality is that the district is  
5 making cuts as it goes along, and it's done that in good faith  
6 with respect to the sites that it dropped as not being ripe and  
7 it can do that again for linking stations to wells,  
8 particularly now that we have this new information. So long as  
9 that's done with the understanding that this isn't an interim  
10 process, I think it could actually be done fairly quickly.

11 THE COURT: Like how fast?

12 MR. MILLER: Your Honor, we think we should do this in  
13 a two-step process. We think we should deal with the 80 that  
14 we've had on the list in the past and still have.

15 THE COURT: Yes, and they need to be linked to wells.  
16 How long would it take to list the wells that you're speaking  
17 of?

18 MR. MILLER: If we do that list, we can get it out in  
19 a mere two to three weeks.

20 THE COURT: You mean within two to three weeks, you  
21 can identify the wells?

22 MR. MILLER: Yes. The newer detections, if they  
23 overlap, with an existing plume would also be done within that  
24 two-, to three-week period. If they're in what I'm going to  
25 call a new area that don't overlap, basically we have a new

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1 plume not previously identified, we need some information from  
2 the defendants.

3 THE COURT: But that's a different issue. That's  
4 outside the 80 or 87 that we're talking about.

5 MR. MILLER: That's correct.

6 THE COURT: Okay. So I just put those off to one  
7 side, because, as you pointed out, you could go through the  
8 ridiculous process of filing new lawsuits, which would end up  
9 consolidated, or you could add them. We don't even need to  
10 face that now. But they're different. I want to stick with  
11 the 87. If in three weeks from today you can provide all of  
12 the well identifications, that's helpful.

13 Then the question is I'm still not satisfied that  
14 we've had a decent conversation about accrual dates because I  
15 agree with defense counsel, you need to fix a time, and defense  
16 counsel says it's not the time at which plaintiffs' attorneys  
17 learn for the first time that there was, what should I say, a  
18 cause of action. That's not the accrual date, what an attorney  
19 learned. There has to be a different definition of accrual  
20 date, and I think I gave that in an opinion three years ago.

21 MR. AXLINE: You did, your Honor. You chose from  
22 among three different options. The options that you gave were  
23 when MTBE gasoline was released. That was the first option.  
24 The second option was when MTBE was detected in groundwater.  
25 That was the second option. And the third option was when the

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# **EXHIBIT B**



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1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK

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2  
3 IN RE: METHYL TERTIARY BUTYL 00 MDL 1358  
3 ETHER ("MTBE") PRODUCTS Master File C.A.  
4 LIABILITY LITIGATION No. 1:00-1898(SAS)

4  
5 -----x

5  
6 January 15, 2009  
6 2:20 p.m.

7  
7 Before:

8  
8 HON. SHIRA A. SCHEINDLIN,  
9  
9 District Judge

10  
10 APPEARANCES

11  
11  
12 WEITZ & LUXENBERG, P.C.  
12 Plaintiffs' Liaison Counsel  
13 BY: ROBIN L. GREENWALD  
13 -and-

14 SHER LEFF, LLP  
14 BY: VICTOR M. SHER

15  
15 BARON & BUDD  
16 Attorneys for Plaintiffs  
16 Suffolk County Water Authority  
17 United Water of New York  
17 BY: CARLA M. BURKE

18  
18 NAPOLI BERN RIPKA, LLP  
19 Attorneys for Plaintiffs Nassau County, et al.  
19 BY: WILLIAM J. DUBANEVICH

20  
20 MICHAEL A. CARDOZO  
21 Corporation Counsel of the  
21 City of New York  
22 Attorney for New York City plaintiffs

22 BY: SUSAN E. AMRON

23 AMANDA C. GOAD

23

24 MILLER AXLINE & SAWYER

24 Attorneys for Plaintiff Orange County Water District

25 BY: TRACEY L. O'REILLY

25

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1 MR. PARKER: That is fine, your Honor, although as we  
2 noted in our reply letter, there's sort of an intervening  
3 issue.

4 THE COURT: This is about identifying which of these  
5 plumes really are ripe for proceeding?

6 MR. PARKER: That's correct, your Honor.

7 THE COURT: I agree. That's the next issue I want to  
8 take up. The next issue on the agenda is the, I don't know,  
9 104, was that it, plumes that are still in the case supposedly  
10 except every time they pick three, those three turn out to be  
11 not ripe and they're no longer in the case. It's like death by  
12 slow cuts. Eliminate three every three weeks, 104, 101, 98,  
13 95. I'll be here the rest of my life.

14 This is not the way to do it. This is a  
15 five-and-a-half-year-old case, Ms. O'Reilly. Has the time come  
16 where I should just say to you are required to look at all 104  
17 and tell me whether you have ripe claims on any of them? I've  
18 kind of had it, because every time they pick three,  
19 miraculously, those are the wrong three. It's not right. This  
20 is not the way to do it.

21 They make a fair argument under Rule 11 that this  
22 should have all been done at the time of the pleading. They  
23 didn't say Rule 11, but it comes to that. They said Rule 12.  
24 But it comes to the same thing. You had an obligation at the  
25 time you filed the complaint to tell them whether you had a

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1 claim or not. Ripeness is jurisdictional, so 104 of these, I'm  
2 afraid you've got to stop everything and try to figure out  
3 whether you have any ripe claims on these plumes.

4 MS. O'REILLY: Your Honor, we already told them that a  
5 week ago.

6 THE COURT: If that's true, I should have gotten that  
7 in a letter. Is that true?

8 MR. PARKER: Your Honor, in their reply letter, which  
9 I think came in on the 14th -- excuse me, the 12th they gave us  
10 the topics.

11 THE COURT: The what?

12 MR. PARKER: When they gave us their expert topics,  
13 they mentioned that they were going to give us a list tomorrow,  
14 not that that list would do anything that would really advance  
15 the ball in identifying what they were doing on any of these  
16 topics.

17 THE COURT: The letter I got on January 12, from Ms.  
18 O'Reilly says nothing like that. It says, "The district hereby  
19 submits its separate response." That's the first sentence.  
20 That's one of three sentences. "The district has served its  
21 identification of expert testimony. The district agrees with  
22 defendants that the previously agreed to pretrial deadlines  
23 need to be adjusted. The district will be prepared to discuss  
24 this issue at the status conference."

25 That's the whole letter I got. It didn't say on the  
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